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JAN 30 1958
JOHN T. FEY, Clerk

In the
Supreme Court of the United States

OCTOBER TERM, 1957

No. 755

SAMUEL GOLDSTEIN,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent;

SAME *v.* SAME;

ROBERT D. QUIRK,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent;

SAME *v.* SAME.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Printing Company, Boston, Mass. — Law Printers

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners Samuel Goldstein and Robert D. Quirk, by their respective attorneys, severally pray that a writ of certiorari issue to review the judgments entered in these cases on December 26, 1957, by the Court of Appeals for the First Circuit.

Opinion Below

The opinion of the Court of Appeals is set out in Appendix A, page 24. It is as yet unreported.

Jurisdiction

The judgments of the Court of Appeals were entered on December 26, 1957. The petitioners severally filed petitions for rehearing on January 9, 1958. The petitions were denied on the same day. The jurisdiction of this Court is invoked under 28 U.S.C. s. 1254(1).

Questions Presented

A. *In the cases against petitioner Goldstein:*

I. Whether from direct evidence that petitioner Goldstein had ordered the manufacture of a number of tanks, pursuant to blueprints furnished by him, paid for his purchases in cash and borrowed the manufacturer's truck to remove the tanks, combined with direct evidence that several months later those tanks were found to be part of an illegal still on petitioner Quirk's farm, a jury could properly have found him guilty of conspiring with petitioner Quirk in violation of 18 U.S.C. s. 371 to commit certain offenses defined in the Internal Revenue laws and of aiding and abetting petitioner Quirk in violation of

18 U.S.C. s. 2 to possess the still, to carry on the business of a distiller, and to manufacture mash.

II. The manufacturer of the tanks, purchased by petitioner Goldstein, having been called as a witness by the Government and having testified in direct examination that petitioner Goldstein had told him that the tanks were going to be used in a laundry somewhere in South Boston, whether petitioner Goldstein had any burden to substantiate the existence of that laundry, either by his own testimony or by other evidence.

III. Assuming that the evidence warranted the conclusion that petitioner Goldstein had knowingly and intentionally furnished petitioner Quirk with the tanks which were subsequently incorporated in the still and that petitioner Quirk possessed the still, carried on the business of a distiller, and manufactured mash, whether a jury could properly have found petitioner Goldstein guilty of aiding and abetting petitioner Quirk in violation of 18 U.S.C. s. 2 to possess the still, to carry on the business of a distiller, and to make mash.

IV. In the event that it is determined that petitioner Quirk was improperly convicted of possessing a still, of carrying on the business of a distiller, and of manufacturing mash, whether petitioner Goldstein's conviction for aiding and abetting petitioner Quirk in the commission of those narrowly defined offenses should be reversed.

B. *In the cases against petitioner Quirk:*

V. In the event that it is determined that petitioner Goldstein was improperly convicted of conspiring with petitioner Quirk to commit certain offenses defined in the

Internal Revenue laws, whether a jury could properly have found petitioner Quirk alone guilty of that conspiracy.

VI. Whether from evidence that toward the end of 1953 petitioner Quirk had purchased two 275-gallon tanks and other assorted appliances similar in kind to what were found in a still assembly on a farm owned in part and operated by him and that petitioner Quirk knew or should have known of the operation of that still on his farm, a jury could properly have found him guilty of having possessed the still, of carrying on the business of a distiller, of manufacturing mash, and of having possessed distilled spirits.

Statutes Involved

18 U.S.C. s. 2 (1952):

> Principals.
>
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. s. 371 (1952):

> Conspiracy to commit offense or to defraud United States.
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any man-

ner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Int. Rev. Code of 1939, s. 2803, 53 Stat. 303, as amended, 54 Stat 512, 26 U.S.C. s. 2803 (1952):

Stamps for containers of distilled spirits.

(a) REQUIREMENT. No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. The provisions of this section shall not apply to—

(1) Distilled spirits placed in a container for immediate consumption on the premises or for preparation for such consumption;

(2) Distilled spirits in bond or in customs custody;

(3) Distilled spirits in immediate containers required to be stamped under existing law;

(4) Distilled spirits in actual process of rectification, blending, or bottling, or in actual use in processes of manufacture;

(5) Distilled spirits on which no internal-revenue tax is required to be paid;

(6) Distilled spirits not intended for sale or for use in the manufacture or production of any article intended for sale; or

(7) Any regularly established common carrier receiving, transporting, delivering, or holding for transportation or delivery distilled spirits in the ordinary course of its business as a common carrier.

(b) PURCHASE AND SUPPLY. Any person placing or intending to place any distilled spirits upon which all internal-revenue taxes have been paid into any container upon which a stamp is required by this section, or withdrawing or intending to withdraw any imported spirits in such containers from customs custody, shall be entitled to purchase sufficient stamps for stamping such containers. Such stamps shall be issued by the Commissioner to each Collector, upon his requisition, in such numbers as may be necessary in his district, and shall be sold by the Collectors to persons entitled thereto upon application therefor and compliance with regulations under this section, at a price of 1 cent for each stamp, except that in the case of stamps for containers of less than one half pint the prices shall be one quarter of 1 cent for each stamp. When in his judgment there is no danger to the revenue, and upon the giving of such bonds or other security as he may deem necessary, the Commissioner may authorize the sale of such stamps to importers for stamping containers in the country from which imported.

(c) UNUSED STAMPS: EXCHANGE, REFUND, ETC. The Commissioner of Internal Revenue, under regulations prescribed by him and approved by the Secretary of the Treasury, may redeem or make allowance for any unused stamps issued under section 203 of the Liquor Taxing Act of 1934 or subsection (b) of this section by exchanging them for other stamps of the same kind or by refunding moneys received therefor: *Provided*, That stamps may be exchanged or the value thereof refunded only in quantities of the value of $5 or more:

And provided further, That no claim for the exchange of strip stamps or refund therefor shall be allowed unless presented within two years after the date on which such stamps were lawfully issued. There are hereby authorized to be appropriated annually, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary to carry out this provision.

(d) REGULATIONS FOR ISSUING, AFFIXING, AND CANCELING STAMPS. The Commissioner, with the approval of the Secretary, shall prescribe (a) regulations with respect to the time and manner of applying for, issuing, affixing, and destroying stamps required by this section, the form and denominations of such stamps, proof that applicants are entitled to such stamps, and the method of accounting for receipts from the sale of such stamps, and (b) such other regulations as he shall deem necessary for the enforcement of this section.

(e) DESTRUCTION OF STAMPS. Every person emptying any container stamped under the provisions of this section shall at the time of emptying such container destroy the stamp thereon.

(f) FORFEITURE OF SPIRITS. All distilled spirits found in any container required to bear a stamp by this section, which container is not stamped in compliance with this section and regulations issued thereunder, shall be forfeited to the United States.

(g) PENALTIES. Any person who violates any provision of this section, or who, with intent to defraud, falsely makes, forges, alters, or counterfeits any stamp made or used under this section, or who uses, sells, or has in his possession any such forged, altered, or counterfeited stamp, or any plate or die used or which may be used in the manufacture thereof, or any stamp

required to be destroyed by this section, or who makes, uses, sells, or has in his possession any paper in imitation of the paper used in the manufacture of any such stamp, or who reuses any stamp required to be destroyed by this section, or who places any distilled spirits in any bottle which has been filled and stamped under this section without destroying the stamp previously affixed to such bottle, or who affixes any stamp issued under this section to any container of distilled spirits on which any tax due is unpaid, or who makes any false statement in any application for stamps under this section, or who has in his possession any such stamps obtained by him otherwise than as provided in subsection (b), shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both. Any officer authorized to enforce any provisions of law relating to internal revenue stamps is authorized to enforce the provisions of this section and the provisions of section 2909 relating to the bottling of distilled spirits in bond.

(h) TRANSFER OF DUTIES.

For transfer of duties and powers of the Commissioner and his agents, see section 3170.

Int. Rev. Code of 1939, s. 2810(a), 53 Stat. 308, as amended, 54 Stat. 715, 26 U.S.C. s. 2810(a) (1952):

Registry of stills.

(a) REQUIREMENT. Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is, by subscribing and filing with him duplicate statements, in

writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; one of which statements shall be retained and preserved by the collector, and the other transmitted by him to the Commissioner. Stills and distilling apparatus shall be registered immediately upon their being set up.

Every still or distilling apparatus not so registered, together with all personal property in the possession or custody, or under the control of such person, and found in the building, or in any yard or inclosure connected with the building in which the same may be set up, shall be forfeited.

And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years.

Stills and distilling apparatus set up at refineries for the refining of crude petroleum or the production of petroleum products and not used in the manufacture of distilled spirits are not required to be registered under this section.

Int. Rev. Code of 1939, s. 2833(a), 53 Stat. 319, 26 U.S.C. s. 2833(a) (1952):

Distilling without giving bond.

(a) PENALTY AND FORFEITURE. Any person who shall carry on the business of a distiller without having

given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises, and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person, who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard, or inclosure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States.

Int. Rev. Code of 1939, s. 2834, 53 Stat. 319, 26 U.S.C. s. 2834 (1952):

Mash, wort, and vinegar; vinegar factories.

No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort, or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person, other than an authorized distiller, shall, by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; and no person shall use spirits or alcohol in manufacturing vinegar or any other article, or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery and (except in the case of vinegar) the tax thereon paid. Every person who violates any provision of this section shall be fined for each offense not less than $500 nor more than $5,000, and be imprisoned not less than six months nor more than two years. Nothing in this section shall be construed to apply to fermented liquors, or to fermented liquids used for the manufacture of vinegar exclusively. But no worm, goose-neck, pipe, conductor, or contrivance of any description whatsoever whereby vapor might in any manner be conveyed away and converted into distilled spirits, shall be used or employed or be fastened to or connected with any vaporizing apparatus used for the manufacture of vinegar; nor shall any worm be permitted on or near the premises where such vaporizing process is carried on.

Nor shall any vinegar factory, for the manufacture of vinegar as aforesaid, be permitted, except as provided in section 2835, within six hundred feet of any distillery or rectifying house. But it shall be lawful

for manufacturers of vinegar to separate, by a vaporizing process, the alcoholic property from the mash produced by them, and condense the same by introducing it into the water or other liquid used in making vinegar.

No person, however, shall remove, or cause to be removed from any vinegar factory or place where vinegar is made, any vinegar or other fluid or material containing a greater proportion than 2 per centum of proof spirits. Any violation of this provision shall incur a forfeiture of the vinegar, fluid, or material containing such proof spirits, and shall subject the person or persons guilty of removing the same to the punishment provided for any violation of this section.

And sections 2827, 2828, and 2830 shall apply to all premises whereon vinegar is manufactured, to all manufacturers of vinegar and their workmen or other persons employed by them.

Statement of the Case

Petitioners Robert D. Quirk and Samuel Goldstein and three other named persons were indicted for conspiring, in violation of 18 U.S.C. s. 371, to commit various offenses defined in the Internal Revenue laws in connection with the operation of a still. Petitioner Quirk was also charged in an indictment containing four counts with having had possession and custody of a still in violation of 26 U.S.C. s. 2810(a), with having carried on the business of distiller without having given the required bond in violation of 26 U.S.C. s. 2833(a), with having manufactured mash fit for distillation and for the production of distilled spirits in violation of 26 U.S.C. s. 2834, and with having possessed distilled spirits in violation of 26 U.S.C. s. 2803(a). Petitioner Goldstein was also charged in a three-count indict-

ment with having aided and abetted petitioner Quirk, in violation of 18 U.S.C. s. 2, to possess the still, to carry on the business of a distiller, and to make mash. In the course of the trial, the other three persons named in the conspiracy indictment were acquitted by directon of the court.

There was testimony to show the following: In September, 1953, petitioner Goldstein ordered from a manufacturer of tanks in Boston the fabrication of twelve tanks pursuant to blueprints furnished by Goldstein. The manufacturer who was a government witness testified that the petitioner Goldstein told him that the tanks were going to be used in a laundry in South Boston.[1] Petitioner Goldstein paid for his purchases in cash and borrowed a truck from the manufacturer in order to remove the tanks. On February 19, 1954, and again on February 20, 1954, investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service detected the odor of mash emanating from a farm on Mossman Road in Sudbury, Massachusetts, owned by petitioner Quirk and his mother. On one of those days the investigators observed three unidentified men enter the suspected barn from a near-by cow barn. The buildings on the farm which was operated by petitioner Quirk consisted of a residence occupied by petitioner Quirk's parents, several barns including the suspected barn and the near-by cow barn, and petitioner Quirk's home which was about three hundred feet away from the suspected barn.[2] On February 23, 1954, the investigators, armed with a search warrant, broke into

[1] There was no evidence that the tanks could not be used in a laundry or for a normal business purpose; nor was there evidence that by the very nature of their construction their use was restricted to an illicit purpose.

[2] Although the court below described petitioner Quirk's home as being "well within smelling distance (of the barn in which the still was found) in respect to the odor of mash", there was no such evidence.

the suspected barn and discovered therein a fully assembled still, which remained hot though the electricity had been turned off. The assembly included among other things, the tanks which the petitioner Goldstein had purchased in September of 1953 and also two 275-gallon tanks and other assorted appliances similar in kind to what the petitioner Quirk had purchased some time toward the end of 1953. Some of the tanks contained alcohol and several others contained mash. Also found were several 5-gallon cans, some containing alcohol and others empty, sixty 100-pound bags of sugar, 280 pounds of dry yeast, a bag of lump ammonia, and five pails of booster material. Electricity was supplied by an underground cable and the cost of the current was charged to petitioner Quirk. Water for the still assembly was supplied by an artificial pond in the rear of the building. No one was present when the investigators broke into the barn. Petitioner Quirk and his brother had left the farm shortly before the raid took place. Upon his return, the investigators arrested him. At the time he denied knowledge of any of the illegal activities being conducted in the barn. At the trial petitioner Quirk denied that he knew petitioner Goldstein. Petitioner Quirk "testified that he had rented the barn on January 18, 1954, to an unprosperous-looking character, whom he called 'Joe Fuci,' for the storage of machinery; that Joe paid in cash an advance of $25.00 for the first month's rental; that he had never seen or heard of Joe before, and never saw him since; that he had no curiosity at all as to why Joe should want to store machinery at the Quirk farm nor as to what type of machinery it was; that he never thereafter saw any smoke coming from the barn nor detected the smell of any odors; that he never saw anybody going to or coming from the barn after the alleged rental agreement; that it never struck him as curious that when February 18, 1954, came around, Joe Fuci did not present

himself to pay the second month's rent." Petitioner Goldstein neither testified nor offered evidence in his behalf. There was no direct testimony to connect petitioner Goldstein with petitioner Quirk.

At the close of the evidence, each of the petitioners moved for a judgment of acquittal in each case. The motions were taken under advisement. Each of the petitioners was found guilty by the jury under each indictment in which he was named. Petitioner Goldstein moved for judgments of acquittal or for a new trial. The petitioners' motions for judgment of acquittal, filed at the conclusion of the evidence, and petitioner Goldstein's motions for judgment of acquittal or a new trial, filed after the verdicts of the jury, were denied. Petitioner Goldstein was sentenced in the conspiracy case to be imprisoned for eight months; the sentence to run concurrently with the sentence in the accessory case. In the accessory case he was sentenced to be imprisoned for eight months and to pay a fine of $1,500.; the prison sentence to run concurrently with that imposed in the conspiracy case. Petitioner Quirk was sentenced to be imprisoned in the conspiracy case for a period of two years; execution of sentence was suspended and he was placed on probation for a period of three years. He received a similar sentence in the case involving the substantive offenses and in addition was ordered to pay a fine of $1000. The probationary periods in both cases were to run concurrently. The sentences were stayed pending review.

Both petitioners appealed to the Court of Appeals for the First Circuit which on December 26, 1957, affirmed the judgments of the District Court. Petitions for rehearing filed on January 9, 1958, were denied that same day. The Court of Appeals stayed its mandates pending review in this Court.

Argument

A. *In the cases against petitioner Goldstein:*

I. After conceding that the case against petitioner Goldstein was perhaps weaker than the case against petitioner Quirk, the court below not only proceeded to mis-state petitioner Goldstein's position, ignore the principles emphasized in *Direct Sales Co.* v. *United States*, 319 U.S. 703, and ground its decision on "pure assumption"; but also approved the broadening of "the already pervasive and wide-sweeping nets of conspiracy prosecutions," contrary to the expressed policy of this Court. *Grunewald* v. *United States*, 353 U.S. 391, 404.

As indicated by the mere statement of this issue, there was no direct evidence that petitioner Goldstein had sold or supplied the tanks to petitioner Quirk or anyone connected with the still either as a seller acting independently of the illicit distiller or as his agent, innocent or otherwise, or as his confederate. There was no direct evidence that he had any contact with petitioner Quirk or anyone else. As a matter of fact, petitioner Quirk denied knowing him. There was no direct evidence that he had knowledge of the conspiracy or of the illicit venture. There was no direct evidence that petitioner Goldstein joined both mind and hand with petitioner Quirk or anyone else to make the accomplishment of the unlawful enterprise possible. There was no direct evidence that petitioner Goldstein had ever been near the still.

The only direct evidence implicating petitioner Goldstein tended to prove that he had purchased some tanks, manufactured according to blueprints furnished by him, and that four or five months later those tanks were found to be part of an illicit still.

First of all, it is questionable, to say the least, because

of the lapse of four or five months, that such evidence gives rise to a proper inference that those tanks went directly, instead of circuitously, to the illicit distiller. Cf. *Van Gorder* v. *United States*, 8 Cir., 21 F.2d 939; *Gargotta* v. *United States*, 8 Cir., 77 F.2d 977. If the evidence does not admit of that inference, it would seem that even the Government would concede that its conspiracy and accessory cases against petitioner Goldstein must collapse. *United States* v. *Peoni*, 2 Cir., 100 F.2d 401.

Secondly, even conceding that such an inference were permitted, other inferences founded on that inference would still have to be drawn; and on the authority of *United States* v. *Ross*, 92 U.S. 281, and on the principles emphasized in *Direct Sales*, the Government's cases against petitioner Goldstein must nevertheless fall. For the jury would still have to infer from the inference, that the tanks went directly to the illicit distillery, that petitioner Goldstein knew of the contemplated illegal venture, a finding which only could be made upon "clear, not equivocal," evidence; and then, after piling on that inference, pile on another inference, that he intended by supplying the tanks "to further, promote and cooperate" in the illegal undertaking. Neither the charge of conspiracy nor the charge of aiding and abetting can "be made out by piling inference upon inference". *Direct Sales Co.* v. *United States*, 319 U.S. 703; cf. *United States* v. *Ross*, 92 U.S. 281, 283, 284.

In short, the evidence was neither of such a character as imported an agreement or concert of action between petitioner Goldstein and petitioner Quirk, a prerequisite for conviction under the conspiracy indictment; nor sufficient to warrant petitioner Goldstein's conviction as an aider and abettor.

That the Court of Appeals erroneously construed the explicit teachings of *Direct Sales* is made clear by its

advancing by implication the purported absence of even a scintilla of evidence of a sale to petitioner Quirk or to anyone else as a reason for the inappositeness of *Direct Sales*. That the court below grounded its decision on pure conjecture and surmise seems equally apparent. For the very absence of direct evidence upon which it based its statement, that "the record contains not a scintilla of evidence indicating that any . . . sale was made to Quirk or to anybody else," is made the foundation for upholding the jury's conclusion that "the equipment was . . . acquired by Goldstein for the very purpose of its being subsequently incorporated in the still . . . by prearrangement with" Quirk. Such a conclusion requires, in the words of the Chief Justice of this Court, "a process of retroactive rationalization;"[3] and is in conflict with the decisions of other courts of appeals.

Compare, for example, *Jehl* v. *United States*, 9 Cir., 127 F.2d 585, where convictions for conspiracy and aiding and abetting were set aside; and *Reid* v. *United States*, 7 Cir., 44 F.2d 51; *Neely* v. *United States*, 5 Cir., 145 F.2d 828; *Butler* v. *United States*, 10 Cir., 197 F.2d 561; *Newman* v. *United States*, 5 Cir., 220 F.2d 289; and *United States* v. *Allard*, 3 Cir., 240 F.2d 840, where convictions were upheld because the evidence was ample and unequivocal that the defendant knew his co-conspirator or principal, knew of the illicit purpose of the enterprise, and intended to participate in accomplishing its objective.

In *United States* v. *Allard*, supra, the Court, although affirming the appellant's conviction, expressly stated that evidence, that appellant under a fictitious name had made a cash purchase of an oil burner larger than the type usually installed in homes, and that subsequently the oil burner was found at the site of the still, *did not by itself*

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[3] *Watkins* v. *United States*, 354 U.S. 178, 204

justify his conviction for conspiracy to distill liquor illegally.

Moreover, the use of a conspiracy indictment here illustrates once again "the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto," despite the protest of this and other courts. See Jackson, J., concurring in *Krulewitch* v. *United States*, 336 U.S. 440, 445, 446; *Grunewald* v. *United States*, 353 U.S. 391, 404.

II. The Court of Appeals' emphasis of the petitioner Goldstein's failure to testify and offer evidence "tending to substantiate the existence of the alleged laundry in South Boston" demonstrates that its decision was influenced by an erroneous concept of law so inconsistent with the accepted and usual course of practice in the field of federal criminal law as to call for an exercise of this Court's power of supervision.

At the trial, the jury was neither asked by the prosecuting attorney nor permitted by the trial judge to draw adverse inferences from the failure of petitioner Goldstein to testify or offer "evidence tending to substantiate the existence of the alleged laundry in South Boston."[4] Any comment on, or the permitting of any adverse inference from, his neglect to testify would have been, if objected to by petitioner Goldstein, reversible error. *Wilson* v. *United States*, 149 U.S. 60; *Bruno* v. *United States*, 308 U.S. 297. Any comment on, or the permitting of any adverse inference from, the failure of petitioner Goldstein to call witnesses "to substantiate the existence of the alleged laundry in South Boston" would also have been error:

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[4] As a matter of fact, the trial judge correctly charged the jury that no inference could be drawn from any defendants failure to take the stand (Consolidated Record Appendix to Petitioners' Briefs in the court below, pages 306 and 307).

first, because there had been no indication that it was within his power to call others than himself[5] or that there were any others to call; and second, because the evidence against him was not so strong that, if innocent, he would be expected to call them. See *Graves* v. *United States*, 150 U.S. 118, and particularly the quotation of what was said by Chief Justice Shaw in the case of *Com.* v. *Webster*, 5 Cush. 295, 316; *Ford* v. *United States*, 5 Cir., 210 F.2d 313, 317; *Samish* v. *United States*, 9 Cir., 223 F.2d 358, 365; *United States* v. *D'Ercole*, 2 Cir., 225 F.2d 611, 614; *Kampmeyer* v. *United States*, 8 Cir., 227 F.2d 313, 323, 324; *McClanahan* v. *United States*, 5 Cir., 230 F.2d 919, 925, 926. Furthermore, evidence that petitioner Goldstein purchased the tanks for a laundry, if believed, would have helped rather than hurt him. Cf. *United States* v. *Peoni*, 2 Cir., 100 F.2d 401.

The Court of Appeals, by stressing what could not properly have been mentioned to the jury, indicates an erroneous concept of an important principle in the field of criminal law. That concept should be corrected. Uncorrected, it imputes a sinister meaning to petitioner Goldstein's right not to testify which should be condemned, cf. *Slochower* v. *Board of Higher Ed. of the City of N. Y.*, 350 U.S. 551, 557; and more important to petitioner Goldstein, denotes that in determining the sufficiency of the evidence against him—evidence which even the court below described as weak—it considered petitioner Goldstein's failure to testify and call others.

III. From all that appears, the Court of Appeals did not consider *Bozza* v. *United States*, 330 U.S. 160, wherein it was said at page 163 that "the Internal Revenue statutes

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[5] The tanks were purchased by petitioner Goldstein in September, 1953, (Consolidated Record Appendix to Petitioners' Briefs in the court below, pages 52, 53). The trial took place in June, 1957.

have broken down the various steps and phases of a continuous illicit distilling business and made each of them a separate offense," requiring the proof for any one offense "to point directly to conduct within the narrow margins which the statute alone defines."

Even if it could be assumed, arguendo, that petitioner Goldstein provided the tanks for the illicit distillery, his activity ended with the sale or supplying of those tanks. Cf. *Young* v. *United States*, 5 Cir., 48 F.2d 26; *United States* v. *Peoni*, 2 Cir., 100 F.2d 401. His convictions as an aider and abettor were, according to *Bozza* v. *United States*, supra, improper since there was no evidence that he ever aided in the exercise of any control over the distillery or served as a caretaker, watchman, lookout, or in any similar capacity; or ever aided in operating the still or in manufacturing the alcohol; or ever helped to make mash, or took any part in or aided or abetted this particular part of the unlawful process in any manner.

IV. Admittedly, the evidence implicating petitioner Quirk probably would have been sufficient to sustain his conviction as a conspirator, *Turinetti* v. *United States*, 8 Cir., 2 F.2d 15; *Reid* v. *United States*, 7 Cir., 44 F.2d 51, if there had been any evidence of an agreement or concert of action with someone else;[6] and also probably would have warranted his conviction as an aider and abettor, *Reid* v. *United States*, supra; *Boyett* v. *United States*, 5

[6] Although there was evidence that on one occasion just before the raid, three unidentified men entered the suspected barn from the near-by cow barn, the trial judge recognized that such evidence was not sufficient to warrant the jury's finding a concert of action between petitioner Quirk and anyone else. He charged the jury, "Now since there are only two defendants (petitioners Goldstein and Quirk) left, you cannot find one of them guilty of conspiracy and the other not guilty, because to conspire you have to have somebody to conspire with, . . ." (Consolidated Record Appendix to Petitioners' Briefs in the court below, page 303).

Cir., 48 F.2d 482, if there had been any evidence of the existence of a principal and if he had been so charged. But *Bozza* v. *United States*, 330 U.S. 160, casts doubt on the sufficiency of the evidence for the purpose of convicting petitioner Quirk as a principal. And if his conviction as a principal is untenable, petitioner Goldstein's conviction as his accessory should be reversed.

B. *In the cases against petitioner Quirk:*

V. Should petitioner Goldstein's conviction for conspiracy be set aside, as has been urged, petitioner Quirk's conviction alone on the conspiracy indictment cannot be sustained, even though the indictment did charge that the named defendants conspired with others unknown to the grand jury, since there was no evidence that others, known or unknown, were members of the conspiracy.[7] *Pomerantz* v. *United States*, 3 Cir., 51 F.2d 911, 913; *Worthington* v. *United States*, 7 Cir., 64 F.2d 936, 939; *Thompson* v. *United States*, 5 Cir., 227 F.2d 671, 673; *United States* v. *Gordon*, 3 Cir., 242 F.2d 122, 125; cf. *Rogers* v. *United States*, 340 U.S. 367. 375.

VI. As pointed out under Part IV, the evidence probably would have been sufficient to sustain petitioner Quirk's conviction as a conspirator if there had been any evidence of an agreement or concert of action with someone else;

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[7] Although there was evidence that on one occasion just before the raid, three unidentified men entered the suspected barn from the near-by cow barn, the trial judge recognized that such evidence was not sufficient to warrant the jury's finding a concert of action between petitioner Quirk and anyone else. He charged the jury, "Now since there are only two defendants (petitioners Goldstein and Quirk) left, you cannot find one of them guilty of conspiracy and the other not guilty, because to conspire you have to have somebody to conspire with, . . ." (Consolidated Record Appendix to Petitioners' Briefs in the court below, page 303).

and also probably would have warranted his conviction as an aider and abettor if there had been any evidence of the existence of a principal and if he had been so charged. But there was no such evidence or charge. Moreover, there was no evidence that petitioner Quirk had exercised control over the completed still assembly; or operated the still or manufactured the alcohol; or made mash; or possessed distilled spirits. At most, the evidence indicated that he had purchased two 75-gallon tanks and other assorted appliances similar in kind to what were found in the still assembly on the farm owned in part and operated by him and that he knew or should have known of the operation of the still on that farm. As a result, it would seem that petitioner Quirk's conviction for possession of a still, for carrying on the business of a distiller, for manufacturing mash, and for having possessed distilled spirits should be set aside. *Bozza* v. *United States*, 330 U.S. 160.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,
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Appendix A.

United States Court of Appeals
For the First Circuit

Nos. 5289, 5290.

ROBERT D. QUIRK,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE;

Nos. 5291, 5292.

SAMUEL GOLDSTEIN,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Harry H. Toltz for Robert D. Quirk, appellant.

Manuel Katz, with whom *Paul T. Smith* and *Albert F. Wood* were on brief, for Samuel Goldstein, appellant.

George H. Lewald, Assistant U. S. Attorney, with whom *Anthony Julian*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

December 26, 1957.

PER CURIAM. These are appeals from judgments of conviction in criminal cases, in which the only question pre-

sented is whether the district court committed reversible error in denying motions by the defendants for judgments of acquittal.

One could perhaps wish that the government agents who raided the illegal still had expended a little more time and patience to "button up" the cases against the various defendants, instead of putting the government to the necessity of relying on the jury to convict on the basis of logical inferences from circumstantial evidence. Nevertheless, we think the cases were strong enough to warrant their submission to the jury, and that the judgments of conviction must stand.

Appellants Robert D. Quirk and Samuel Goldstein were convicted under indictments charging that they violated 18 U.S.C. § 371 by conspiring, with three other named persons, to commit various offenses defined in the federal liquor laws. In the course of the trial, the indictments against the other three persons were dismissed by order of the district court for lack of evidence.

Appellant Quirk was also convicted under an indictment charging, in four counts, the commission of various substantive liquor offenses, and appellant Goldstein was convicted under an indictment charging him with having aided and abetted Quirk in their commission.

There is no doubt that somebody was operating an illegal still at the Quirk farm in Sudbury, Massachusetts. This farm, though jointly owned by defendant-appellant Quirk and his mother, was actually run by the defendant. On the farm were a residence occupied by Quirk's parents, a residence occupied by Quirk, and several barns. Defendant Quirk's home was about 700 feet away from the barn in which the illegal distillery was being conducted, well within smelling distance in respect to the odor of mash, though Quirk insisted that he was completely unaware of what was going on in the barn.

Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, having detected the odor of mash, and three men, unidentified, having been observed to enter the suspected barn from the near-by cow barn, broke into the building on February 23, 1954, armed with a search warrant, the validity of which is not questioned. A padlock had to be forced, and no one was found in the building at the time.

However, the investigators did discover in the building a fully assembled still, which remained hot, though the electricity had been turned off. The assembly included a boiler, powered by an oil burner, two 275-gallon tanks, a 9 x 5 ft. horizontal still pot or cooker, a copper column extending from the cellar to the attic of the building equipped with water pressure tanks and pumps, condensers, a rectangular tank containing alcohol, and several other rectangular tanks containing "mash". Also found were several 5-gallon cans, some containing alcohol and others empty, sixty 100-lb. bags of sugar, 280 pounds of dry yeast, a bag of lump ammonia, and five pails of booster material. Electricity was supplied by an underground cable, and the cost of the current was charged to defendant Quirk. Water for the still assembly was supplied by an artificial pond in the rear of the building.

According to the testimony of defendant Quirk, he and his brother had left the Quirk farm shortly before the raid took place; when they returned he found the investigators at the barn and made his identity known to the agents. Though he stoutly denied knowledge of any of the illegal activities being conducted in the barn, defendant Quirk was arrested at that time.

Quirk further testified that he had rented the barn on January 18, 1954, to an unprosperous-looking character whom he called "Joe Fuci," for the storage of machinery; that Joe paid in cash an advance of $25.00 for the first

month's rental; that he had never seen or heard of Joe before, and never saw him since; that he had no curiosity at all as to why Joe should want to store machinery at the Quirk farm nor as to what type of machinery it was; that he never thereafter saw any smoke coming from the barn nor detected the smell of any odors; that he never saw anybody going to or coming from the barn after the alleged rental agreement; that it never struck him as curious that when February 18, 1954, came around, Joe Fuci did not present himself to pay the second month's rent. Joe Fuci was not produced as a witness, nor was any evidence offered to substantiate the story of the lease to him. Quirk's testimony concerning his activities during the period in question was seriously contradicted by various disinterested witnesses.

It was in evidence that sometime toward the end of 1953 Quirk had purchased two 275-gallon tanks and other assorted appliances similar in kind to what were found in the still assembly.

On this evidence the members of the jury were not naive enough to find Quirk innocent of the offenses charged in the indictments.

The case against Goldstein was perhaps weaker. There was no direct testimony to connect Goldstein with defendant Robert Quirk, who in fact denied ever having seen Goldstein before. The evidence was that the still pot or cooker and the rectangular tanks which were found as parts of the still assembly were articles which had been manufactured at Goldstein's order by the Wharf Forging & Welding Company. The official of this company who negotiated with Goldstein testified that Goldstein told him that the tanks were going to be used in a laundry somewhere in South Boston. Goldstein himself did not testify, nor did he offer any evidence tending to substantiate the existence of the alleged laundry in South Boston. Upon completion of the

equipment pursuant to blueprints furnished by Goldstein, the latter paid for his purchases in cash and borrowed the company's truck to remove the tanks, which were later specifically traced to the still assembly at the Quirk farm.

Goldstein's argument is based upon the pure assumption that he might have sold the tanks to Quirk sometime between the date of their purchase and the raid at the Quirk farm a few months later; and he argues that mere knowledge of an illegal purpose on the part of the buyer is not sufficient to convict the seller of engaging in a conspiracy with the buyer. Of course, this is not necessarily so, as is made clear in *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943). Besides that, the record contains not a scintilla of evidence indicating that any such sale was made to Quirk, or to anybody else. The jury were warranted in concluding that the equipment procured by Goldstein, and later found in the still assembly, was designed for the use to which it was put, and was acquired by Goldstein for the very purpose of its being subsequently incorporated in the still at the Quirk farm, by prearrangement with appellant Robert Quirk.

Judgments will be entered affirming the judgments of the District Court.